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728-189—64——1

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. ——

FEDERAL TRADE COMMISSION, PETITIONER

v.

THE AMERICAN OIL COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the Federal Trade Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in this case on November 19, 1963.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, *infra*, pp. 17–28) is reported at 325 F. 2d 101. The opinion and order of the Federal Trade Commission (R. 628–662)[1] are not yet reported.

JURISDICTION

The judgment of the court of appeals (Appendix B, *infra*, pp. 29–30) was entered on November 19, 1963.

[1] "R." refers to the Appendix to Brief for the American Oil Company in the court of appeals.

The time for filing a petition for a writ of certiorari was extended by Mr. Justice Clark on February 17, 1964, and March 18, 1964, to and including March 18, 1964, and April 17, 1964, respectively. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 2(a) of the Clayton Act prohibits a seller from discriminating in price between its customers "where the effect of such discrimination may be substantially to lessen competition * * *, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *." The question presented is whether the requisite competitive injury is established by showing that a seller has discriminated in price among purchasers for resale who compete with each other, that the amount of such discrimination is substantial, that the discrimination is directly reflected in the resale prices of the purchasers, and that its actual or probable effect will be the shift of retail customers from the unfavored to the favored purchasers.

STATUTE INVOLVED

Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. 13(a), provides in part as follows:

> That it shall be unlawful for any person engaged in commerce, either directly or indirectly to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers

involved in such discrimination are in commerce * * * where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them * * *.

STATEMENT

This case involves the standards for determining whether price discriminations given by a major oil company to retail gasoline service station operators during a gasoline price war had a sufficiently adverse effect upon competition to bring them within the prohibitions of Section 2(a) of the Clayton Act. The price war occurred in Smyrna, Georgia, for a 17-day period in October, 1958, during which the respondent The American Oil Company ("American") granted substantially lower prices to its retail dealers in Smyrna than it gave to its dealer in the adjoining city of Marietta, Georgia.

The facts. The underlying facts are not in dispute, and the following statement is based mainly upon the court of appeals' opinion. American is a major distributor of gasoline, which it sells to independent service station operators under its brand names of "Amoco" and "American" (App. A, *infra*, p. 19). Smyrna and Marietta are adjoining cities located approximately fifteen miles northwest of Atlanta (*id.*, p. 19). American has four dealers in the Smyrna area and six dealers in the Marietta area (*id.*, p. 20). For purposes of gasoline pricing, American treated each area separately (*id.*, p. 20).

The price war began when an operator of a major brand station (Shell) in Smyrna posted a pump price meeting exactly the pump price of a station (Paraland) selling an "unbranded or private brand gasoline" (*id.*, p. 21). Other stations in the vicinity selling other "major brands" (Texaco, Sinclair and Gulf), as well as an American dealer (Hicks), lowered their pump prices to match those of the Shell station. In each instance, the supplier gave its Smyrna dealers a discount sufficient to enable them to meet the lower posted price and yet maintain the normal gross margin of five cents per gallon between their buying and selling prices (*id.*, pp. 20–22). As the price war continued, American and the other suppliers of major brand gasoline continued to sell to their Smyrna area dealers at lower prices than they were selling to their Marietta area dealers. Whenever American reduced its price to its Smyrna dealers, it matched a prior reduction which at least one of the other major brands had granted to its dealers in Smyrna (*id.*, pp. 21-22). The differential which American gave its Smyrna dealers over its Marietta dealers ranged from 3.5 cents to 11.5 cents per gallon (*id.*, p. 21).

People residing in the Marietta area "regularly drove into or near Smyrna to work or to shop" (R. 633), and thus had "ready access to all of the favored Smyrna stations" (R. 607). The gasoline price war in the Smyrna area attracted customers from the Marietta area (App. A, *infra*, p. 24). Some motorists had a preference for American's gasoline "if the

price differential was not too great" (*id.*, p. 24; R. 192–194, 633). At least three American dealers in Marietta lost business to American dealers in Smyrna who had received the lower prices (Smith, R. 119–120; Seagraves, R. 132; Hitt, R. 281–283).

The Commission proceedings. On November 23, 1960, the Commission issued a complaint charging that American had violated Section 2(a) through the foregoing price discriminations (R. 3–6). After full hearings, an examiner issued an initial decision (R. 598–622) concluding that American had committed the violation charged.

On appeal, the Commission (Commissioner Elman dissenting) modified and adopted the initial decision (R. 633–644), and entered a cease-and-desist order (R. 628–629). The Commission found (R. 633–634) that American's Smyrna and Marietta dealers competed with each other in the resale of American's gasolines; that the instances of American's discrimination were substantial in amount; that the discrimination was directly reflected in the dealers' resale prices of American's gasolines; and that such differences in resale price were sufficient to and did divert customers from American's Marietta to its Smyrna dealers. The Commission concluded (R. 635) that these instances of price discriminations seriously impaired the competitive opportunities of the Marietta dealers and, accordingly, that their effect may have been substantially to lessen competition or to injure, destroy or prevent competition with the Smyrna dealers.

The Commission rejected (R. 635–636) American's contention that the short duration of the price discriminations barred a finding of competitive injury. The Commission also rejected (R. 635) American's argument that its Marietta dealers "would have been injured" by the lower prices of dealers selling other brands of gasoline irrespective of whether American reduced its price to Smyrna dealers. The Commission pointed out (*ibid.*) that American had in fact discriminated in price and that such discrimination adversely affected competition between American's dealers in the resale of American's gasolines.[2]

The Court of Appeals decision. The court of appeals set aside the Commission's order on the ground that the requisite injury to competition had not been shown. It held (App. A, *infra,* pp. 23–24) that the adverse effect upon competition which the statute prohibits is "such an injury as will with reasonable probability substantially lessen the ability of the unfavored dealers to continue to compete"; that although the statute "is concerned" with "[p]rice discrimination which shifts business between competitors in a 'second line' case * * * it is essential to the establishment of the violation here charged that

[2] The Commission also rejected American's contentions that its lower prices in Smyrna were justified (1) under Section 2(b) as made in good faith to meet an equally low price of a competitor (R. 637–641), and (2) under the proviso to Section 2(a) permitting "price changes * * * in response to changing conditions affecting the market for or the marketability of the goods concerned" (R. 642). Since the court of appeals set the order aside on the ground that the requisite injury to competition had not been shown, it did not reach these other issues (App. A, *infra*, p. 28).

there be a causal relation between the price discrimination to the favored customers and the factor relied upon as evidencing an actual or reasonably probable substantial lessening of ability to compete on the part of the unfavored customers;" and that in this case "not only was the actual economic loss sustained by the unfavored Marietta dealers during the Smyrna price war slight, but there is a lack of any substantial evidence to support a conclusion that this temporary and transient limited economic impact was the result of American's discriminatory price reduction to its Smyrna dealers, much less that it constituted a probable threat to the ability of the Marietta dealers to continue in competition." The court concluded (*id.*, pp. 26–27) that any actual or probable injury to the Marietta dealers' ability to compete shown by the record "was not only minimal but there is no substantial evidence to show that it was the result of American's price reductions to its Smyrna dealers rather than for the most part attributable to the fact that the major brands of gasoline were being sold in the Smyrna area for substantially less than in the Marietta area."

REASONS FOR GRANTING THE WRIT

This case presents a major question under the price discrimination prohibitions of Section 2(a) of the Clayton Act which this Court should resolve because of its importance both to the Federal Trade Commission in its attempts to deal with the competitive problems posed by retail gasoline price wars and to thousands of retail service station operators.

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Gasoline price wars are a widespread phenomenon in the oil industry. The major oil companies customarily subsidize the dealers who conduct such battles by giving them substantial price concessions not given to competing dealers in neighboring areas who are not participating in the price war. These widespread price discriminations have created a serious economic problem for the thousands of independent retail gasoline dealers who are the victims of discriminatory treatment. Congress has frequently studied the problem and has expressed its concern over the plight of these small businessmen. The Commission has pending a substantial number of proceedings involving gasoline price wars, many of which rest on the same theory of injury to competition as the present case. A court of appeals decision with such far-reaching impact should be reviewed by this Court.

1. Gasoline price warfare at the retail level is widespread and, as this Court noted last Term, "appears to be caused by a number of basic factors, not the least of which are industry overcapacity and the propensity of some major refiners to engage in so-called 'dual marketing' under which, in order to increase their overall sales and utilize idle facilities, they not only sell branded gasoline to their own dealers but also sell unbranded gasoline to independent retailers or jobbers, often at a lower price" (*Federal Trade Commission* v. *Sun Oil Co.*, 371 U.S. 505, 525). Numerous service station operators believe that "many price wars were started and controlled by the major oil companies for the purpose of either moving surplus gasoline or disciplining retail price

cutters" (H. Rep. No. 1423, 84th Cong., 1st Sess., p. 12). But whatever the causes of the various types of price wars (*id.*, 13–17), they have a serious impact on the dealers in the area.

Because of the limited resources and the narrow margin upon which retail gasoline dealers operate—generally 4 to 5 cents a gallon—it is necessary for their suppliers to subsidize them in any substantial price war. The subsidization customarily takes the form of an allowance off the regular wholesale price that covers all, or the major part, of the retail price reductions. This aid is ordinarily available, however, only to dealers directly participating in the price war. Because of the close physical proximity of many other service stations selling the same brand of gasoline, the resulting discrimination may—and frequently does—have a seriously adverse economic impact upon the dealers who do not receive the lower prices from suppliers but are close enough to the price war area to suffer a diversion of business. See S. Rep. 2810, 84th Cong., 2d Sess., pp. 19–20; see, also, *Federal Trade Commission* v. *Sun Oil Co.*, 371 U.S. 505, 510.

Various congressional committees and individual members of Congress repeatedly have expressed concern over the serious anticompetitive effects of these price wars (see, *e.g.*, 110 Cong. Rec. 4975). The Senate Select Committee on Small Business, which investigated a protracted gasoline price war in New Jersey, reported that it "had reduced the dealers to a desperate financial plight, from which they were unable to extricate themselves," and urged the Commission to "move promptly against any major sup-

plier still granting discriminatory price allowances to some of his dealers" (S. Rep. 2810, 84th Cong., 2d Sess., pp. 14, 29).

The investigation and hearing of cases involving price discriminations growing out of retail gasoline price wars currently is a major part of the Commission's enforcement activities under Section 2(a) of the Clayton Act. Two cases have been argued before the Commission and are awaiting decision (*Texaco, Inc.*, Docket 6888, and *Shell Oil Co.*, Docket 8537); a third case is pending before the hearing examiner (*Humble Oil & Refining Co.*, Docket No. 8544). Eight other price discrimination matters are in various stages of investigation, although no complaints have been issued. The three formal cases and the eight investigations are all based on the same theory of injury to competition that is involved in the present case.

The three respondents in those cases, and seven of the eight companies involved in the investigations, all do business in the Seventh Circuit. Review of any orders the Commission may enter in those cases is almost certain to be sought in the Seventh Circuit, and that court, following its decision in the present case, would undoubtedly set aside any orders. Hence there is little chance that a conflict between two circuits can be developed. The decision below, if allowed to stand, will become the definitive judicial ruling.

In these circumstances, and because of the obvious public importance of the question, review by this Court is warranted.

2. The Commission submits that *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37, fully supports its conclusion that the effect of American's price discriminations in the present case may have been "substantially to lessen competition" or to "injure, destroy or prevent competition" between American's Marietta and Smyrna dealers. The question in that case was whether the Commission had properly concluded that a quality discount system, under which large retailers who purchased directly from Morton Salt paid lower prices for salt than competing independently-operated retail stores who purchased salt from jobbers, had the adverse effect on competition that the statute condemns. The record before the Commission contained "testimony from many witnesses in various parts of the country to show that they had suffered actual financial losses on account of respondent's discriminatory prices" (334 U.S. at 50). The Court admonished the Commission for going "much further in receiving evidence than the statute requires," since there was no need for "testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence" (pp. 50–51). The Court emphasized the same point when, in noting that the Commission had not been re-

quired to find, as it did, that "injury to competition * * * had resulted from respondent's discounts," it stated (pp. 46–47):

> Here the Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay.

In the present case, the Commission believes that the substantial discounts which American gave to its Smyrna dealers similarly justified the conclusion that the requisite injury to competition had been shown because "the competitive opportunities of those dealers who were required to pay the higher prices were seriously impaired" (R. 634). The differentials ranged from 3.5 to 11.5 cents per gallon, and they were directly reflected in the retail pump price of the gasoline. The Commission noted that American's district sales manager "admitted that a price difference of 5 to 6 cents a gallon at retail would be sufficient to affect competition between dealers located in Smyrna and those located in Marietta" (R. 633–634; R. 275). The record shows that, as a result of the lower prices which the discriminations enabled American's Smyrna dealers to charge, American's Marietta dealers lost business to their competitors in that city (see, *supra*, p. 5). As this Court explained in the *Sun Oil* case, *supra*, 371 U.S. 505, 519 (making minor changes in the language to fit the facts of the present case):

> It is the very operators of the other [American] stations [in Marietta] which compete with

> [the American stations in Smyrna] who are the direct objects of protection under the Robinson-Patman Act. The basic purpose of the Act was to insure that such purchasers from a single supplier, [American], would not be injured by that supplier's discriminatory practices.

Thus, in the present case, as in *Morton Salt*, it would "appear to be obvious, that the competitive opportunities of certain merchants [the Marietta dealers] were injured when they had to pay respondent substantially more for their goods than their competitors [in Smyrna] had to pay" (334 U.S. at 46–47). And, as *Morton Salt* teaches (p. 50), that is enough to establish the " 'reasonable possibility' that competition may be adversely affected" which the statute requires. Indeed, in the Commission's view the injury to competition resulting from the price discriminations in the present case was even more severe than in *Morton Salt*. For the product there involved—salt—was only "a small item in most wholesale and retail businesses" (334 U.S. at 49), whereas gasoline is the principal product sold by service stations.

The Commission believes that the court of appeals' attempted distinction of *Morton Salt* on the ground that it involved a "discriminatory pricing system * * * which gave buyers of large quantities a built-in, routine and permanent price advantage over smaller rivals," whereas the present case involved temporary price reductions resulting in relatively small shifts of business (App. A, *infra*, pp. 27–28), is unsound. As the Commission reads *Morton Salt*, the significant fact there was not the systematic character of the

discriminations, but the obvious economic reality that a merchant who had to pay significantly more for his product than his competitors was under a serious economic handicap. The Marietta dealers in the present case, who had to pay from 3.5 to 11.5 cents more per gallon than their Smyrna competitors, obviously could not hope to compete effectively against those dealers. And this competitive handicap, with its consequent probable adverse effect upon competition, existed as long as the price war continued. Although the court of appeals' opinion purports to rest primarily on a rejection of the evidentiary support for the Commission's finding of competitive injury, this ruling in turn necessarily is based upon a fundamental disagreement with the Commission as to the kind of showing sufficient to establish such injury, and it is on that issue that the Commission believes *Morton Salt* to be controlling.

In short, the Commission believes that if *Morton Salt* means what it seems to say, it was fully warranted in concluding (R. 633) that "in price discrimination cases involving competition between buyers, the requisite injury to such competition may be inferred from a showing that the seller charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors and that the amount of this discimination was substantial." Indeed, under this view it was unnecessary for the Commission further to consider whether in fact there was any significant diversion of business from American's Marietta to its Smyrna dealers.

Perhaps the Commission's reading of *Morton Salt* is too broad but with the agency charged with administering the statute and the only court of appeals likely to pass upon the issue holding opposite views upon a question of such widespread impact, review upon certiorari is warranted. For only this Court can definitively settle whether its prior decision means what it appears to say, or whether, as the court of appeals held, its broad language is to be limited to the particular type of price discrimination there involved, namely, a quantity discount *system*. The Court's citation of Commissioner Elman's dissenting opinion in the present case in its *Sun Oil* opinion (371 U.S. at 527, n. 15) cannot be deemed a considered determination of the point.

CONCLUSION

In view of the importance of the question in the Commission's administration of the Clayton Act, the economic significance of the problem, and the unlikelihood of a conflict developing between the circuits, the Solicitor General joins the Commission in urging that certiorari be granted. The Solicitor General, however, does not agree with the Commission in its reading of *Morton Salt* or on the merits, and if the petition for certiorari is granted, he will not support the agency further.

Respectfully submitted.

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APRIL 1964

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

September Term, 1963. September Session, 1963

No. 13879

THE AMERICAN OIL COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

Petition to review and set aside an order of the Federal Trade Commission

November 19, 1963

Before CASTLE, KILEY and SWYGERT, Circuit Judges

CASTLE, *Circuit Judge.* This case is before the Court on the petition of The American Oil Company (hereinafter referred to as American) for review[1] of a cease and desist order issued against it by the Federal Trade Commission, respondent, following a hearing on a complaint charging American with violation of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. (15 U.S.C.A. § 13(a)).[2]

[1] Review is sought pursuant to 15 U.S.C.A. § 21.

[2] 15 U.S.C.A. § 13(a) provides in pertinent part: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within

The Commission found[3] that American had engaged in discriminatory pricing practices in connection with the sale and distribution of gasolines to its dealer-customers in and around Smyrna and Marietta, Georgia, by selling such gasolines to certain of its customers at higher prices than it did to other customers, and that the discriminations in price had the effect on customer competition proscribed by the statute. The Commission rejected American's affirmative Section 2(b) defense[4] that any lower price to any dealer in the area was made in good faith to meet an equally low price of a competitor. Also rejected was American's claim that any differences in its prices were the result of price changes in response to changing conditions affecting the market for or the marketability of the goods concerned.[5]

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the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *"

[3] On American's appeal from the examiner the Commission filed an opinion in which it modified the initial decision of the examiner, then adopted it as its own, and issued the order brought here for review. Commissioner Elman dissented from the majority ruling.

[4] Section 2(b) of the statute (15 U.S.C.A. § 13(b)) provides in pertinent part: "Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price * * * to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor. * * *"

[5] This defense was asserted under the following proviso to Section 2(a): "And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or

The record discloses that American is engaged in the sale and distribution of gasoline and other products in twenty-five states and in the District of Columbia. In connection with its business in the State of Georgia, American has entered into contracts with service station operators pursuant to the provisions of which it sells and delivers its "Amoco" and "American" gasolines, according to the dealer-customers' requirements and orders. Ten of American's dealers are located in and around the vicinity of Smyrna and Marietta, Georgia. American's pricing practices in the sale of gasoline to these ten customers during a seventeen day period only is here involved. This period extended from October 10 to 28, 1958, and coincided with a gasoline price war in Smyrna.

Smyrna and Marietta are adjoining cities located approximately fifteen miles northwest of Atlanta, Georgia. Their common border consists of contiguous residential communities. Marietta is north of Smyrna. There are two main north-south highways in the Smyrna-Marietta area—State route 3 and U.S. route 41. State route 3 is the main highway from Marietta south to Smyrna which connects both cities with the Lockheed Aircraft Corporation plant and Dobbins Air Force Base. Also located on State route 3, in the heart of Smyrna, is a large shopping center patronized by inhabitants of the Smyrna-Marietta area. U.S. route 41 is a four lane highway running somewhat parallel to and about two miles east of route 3. It is a main arterial route between the mid-

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the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."

western states and Florida. The aircraft plant and the airforce base are located between the two highways.

For the purpose of gasoline pricing the Smyrna-Marietta area was divided into two areas. Area #1 or Smyrna area included generally the City of Smyrna and the areas to the south. Four of American's customer-dealers were located in this area. Area #5 or Marietta area included the City of Marietta and certain of American's dealers located to the south of Marietta and to the east of Smyrna on U.S. 41. Six of American's dealers were located in this area. The pattern of traffic flow between the two cities, and to and from the industrial plant, airforce installation and the shopping center, was such that local motorists had ready access to most of the American dealers located in either of the pricing areas.

In establishing the prices its dealers are to pay for gasoline. American quotes a tank wagon price. In addition, as conditions may require, American establishes a competitive price allowance (CPA) which it grants to its dealers in the predetermined area. Accordingly, as the "CPA" increases the price paid by the dealer for the gasoline decreases. Dealer's pump prices to their patrons are based on the net price afforded them by American, their supplier. Generally the dealers maintain a gross margin of profit of five cents per gallon. Thus the amounts of all price differences either in the purchase price or the resale price are measured by the amount of the "CPA" or discount extended to the dealers.

A summary of the extent of the price discriminations favoring American's Smyrna dealers, as contrasted to its price to Marietta area dealers, during the seventeen day period involved, shown in cents per gallon, follows:

Day	Date	Discrimination in favor of Smyrna Dealers
Fri.,	10/10	0.0
Sat.,	10/11	3.5
Sun.,	10/12	3.5
Mon.,	10/13	3.5
Tue.,	10/14	6.0
Wed.,	10/15	8.0
Thu.,	10/16	8.0
Fri.,	10/17	10.0
Sat.,	10/18	7.5
Sun.,	10/19	7.5
Mon.,	10/20	8.5
Tue.,	10/21	11.5
Wed.,	10/22	5.0
Thu.,	10/23	5.0
Fri.,	10/24	5.0
Sat.,	10/25	5.0
Sun.,	10/26	5.0
Mon.,	10/27	5.0
Tue.,	10/28	0.0

American's price reductions were made in response to a gasoline price war which originated in Smyrna when on October 10, 1958, the operator of a major-brand station (Shell) posted a pump price meeting that of a station (Paraland) selling an "unbranded or private brand gasoline." The Paraland station was located one block south of the Shell station on the northern outskirts ~~of~~ Smyrna. It had just commenced operations. Thereafter stations in the vicinity selling other "major brands" (Texaco, Sinclair and Gulf) lowered their prices to match those of the Shell station. The Paraland station was located immediately to the rear of an American station operated by George Hicks. As the retail prices of gasoline dropped Hicks and the other American

Smyrna area dealers, with the assistance of a greater "CPA" than American extended to Marietta area dealers, also lowered their retail price. In lowering its price to the favored Smyrna dealers, American matched a pre-existing price reduction of at least one of the other major brands. And, in each instance, American first verified that its dealer's nearby rival major-brand stations were receiving price assistance from their suppliers.

The price war ended October 28, 1958, and the prices of all competitors returned to higher levels. American's "CPA" in the areas involved was then uniform.

Before proceeding to examine the evidence upon which the Commission bases its conclusion that American's discrimination in price between its Smyrna area and Marietta area dealers had the effect on customer competition proscribed by Section 2(a) we turn to consideration of the issue or issues which that examination must resolve.

American states that the principal legal issue presented for determination is whether "substantial 'injury' to competition within the meaning of Section 2(a) was caused by American's" price reductions granted to Smyrna area dealers but not to Marietta area dealers. American characterizes as subsidiary issues (1) whether the reductions, in any event, "were 'made in good faith to meet an equally low price of a competitor', and hence legally justified under the statutory 'meeting competition' proviso" and (2) whether the reductions "were granted in response to 'changing conditions affecting the market for' gasoline, and thus vindicated by the Act's 'changing conditions' proviso". In addition, American contends that irrespective of the merits, the Commission's order is defective as too broad and sweeping in scope.

From our analysis of the contentions advanced by American and the Commission we find that the major issue presented for our determination in this review is whether the Commission's finding and conclusion that American's discriminations in price between its customers had the adverse effect upon customer competition proscribed by Section 2(a) is supported by substantial evidence on the record considered as a whole and represents the application of the correct legal criteria.

The adverse effect upon competition requisite to establish the Section 2(a) violation with which the Commission has here charged American is that the price discrimination creates a reasonable probability of substantial injury to competition—such an injury as will with reasonable probability substantially lessen the ability of the unfavored dealers to continue to compete. Price discrimination does not *per se* constitute a violation of Section 2(a). *Anheuser-Busch, Inc.* v. *F.T.C.*, 7 Cir., 289 F. 2d 835. The price discrimination, no matter if substantial, must in the particular factual situation involved be capable of raising a reasonable probability of substantially lessening ability to compete. The protection intended to be afforded by the statute is directed to the preservation of competition. The statute's concern with the individual competitor is but incidental. Price discrimination which shifts business between competitors in a "second line" case such as this, where competition at the customer level is involved, is, of course, a matter with which the statute is concerned. But in addition to competitors, price discrimination, and the fact of a shift of some business from or other adverse economic effect upon the unfavored customers, it is essential to the establishment of the violation here charged that there be a causal relation between the price discrimination to the favored customers and the

factor relied upon as evidencing an actual or reasonably probable substantial lessening of ability to compete on the part of the unfavored customers.

In the instant case not only was the actual economic loss sustained by the unfavored Marietta dealers during the Smyrna price war slight, but there is a lack of any substantial evidence to support a conclusion that this temporary and transient limited economic impact was the result of American's discriminatory price reduction to its Smyrna dealers, much less that it constituted a probable threat to the ability of the Marietta dealers to continue in competition. The record discloses no basis for a conclusion that there was a likelihood of any substantial impairment of the "vigor or health of the contest for business" between American's competing dealers. And that is the competition which is sought to be protected by the statute in the context of the situation here presented. Cf. *Anheuser-Busch, Inc.* v. *F.T.C.*, 7 Cir. 289 F. 2d 835, 840, and authorities there cited.

The gasoline price war in the Smyrna area attracted patrons from the Marietta area. There is testimony that there was a preference on the part of some motorists for American's gasolines, but only "if the price differential was not too great". And with respect to all major brands of gasoline the retail price differential between the two communities during the period here involved was such that it strains credulity to expect that customer loyalty and brand preference would have retained for American's Marietta dealers all of their patrons and their usual volume of business during the seventeen days of price cutting in the adjoining area.

And, as the evidence hereinafter summarized discloses, there is nothing to indicate that American's temporary price reductions, although discriminatory,

precipitated any reasonable probability of a substantial lessening of ability on the part of the unfavored Marietta area dealers to continue to compete. Nor is such relatively minor and temporary loss of business as is disclosed shown by substantial evidence or reasonable inference to have been the result of American's conduct.

Anderson, one of the six unfavored Marietta American dealers, operated a combined grocery store and service station on State route 3. His station was located approximately one and one-quarter miles north of favored Smyrna area dealer Hicks' station. There is evidence which supports a conclusion that the reduction in the volume of Anderson's gasoline sales during the period of the Smyrna price war represented a loss of gross profit to him of as much as $150.00. Smith, an unfavored Marietta area dealer, located about one-half mile north of Anderson, experienced a reduction in gallonage sold as compared with the equivalent periods in 1957 and 1959. But, on the figures and percentages shown by the record any loss of gross profit during the period to which the Commission points would be slight. Marietta dealer Hitt, who was located about five miles from Hicks—further north on route 3, testified that although "he might have lost some" business during the Smyrna price war period he "never complained about it." One of Hitt's patrons testified that during the price war he bought gasoline—12 or 14 gallons—from Hicks five or six times because of the cheaper price. Two other patrons of Hitt bought gasoline in Smyrna during the price war but neither the quantity of their purchases nor whether they patronized Hicks or any of the other three favored American dealers in the Smyrna area is disclosed.

American's Marietta area dealers Seagraves, Morris and Raines, who also were not afforded the higher "CPA's", were located on or near U.S. Highway 41. Seagraves was closest to Smyrna, approximately two and one-half miles away. He had just opened his station for business on October 1, 1958. He testified that during the price war in Smyrna he felt his business "slacking up each day" and that patrons were asking him when his price was going to come down, but that after October 15, 1958, when American increased his "CPA", he lowered his price and "business went to picking back up". Morris was located approximately one and one-half miles north of Seagraves. He testified that most of his business was transient but that the "locals" complained that his price was "higher than other people who had the same gasoline down the road". His sales dropped approximately 1,000 gallons during October 1958. This would represent a loss of about fifty dollars gross profit. Raines was located approximately two miles north of Morris. He testified that the Smyrna price war affected his business "to a certain degree". Some of his patrons told him that they were buying gasoline at the cheaper price in Smyrna. He estimated that his business during the price war period was reduced "$500.00 overall in all business". What this may have represented in loss of profit is not shown.

Thus, whatever injury to ability to compete, whether actual or probable, as is shown by the record, was not only minimal but there is no substantial evidence to show that it was the result of American's price reductions to its Smyrna dealers rather than for the most part attributable to the fact that the major brands of gasoline were being sold in the Smyrna area for substantially less than in the Mari-

etta area. American's dealer assistance in the Smyrna area in the form of increased "CPA's", higher than those extended to its Marietta area dealers, was the result of such condition not the cause of it. The record in this case does not afford a substantial basis upon which to attribute to American's conduct a reasonably probable substantial injury to competition.

The record here does not present that inherent capability of lessening competitive ability as was evidenced by the discriminatory pricing system in *F.T.C.* v. *Morton Salt Co.*, 334 U.S. 37, which gave buyers of large quantities a built-in, routine and permanent price advantage over smaller rivals. *Corn Products Refining Co.* v. *F.T.C.*, 324 U.S. 726, also relied upon by the Commission, involved a systematic price discrimination based on "phantom" freight charges and geographic factors which carried a like inherent threat of substantial impairment to competition. In *E. Edelmann & Company* v. *F.T.C.*, 7 Cir. 239 F. 2d 152, the price discriminations were in the form of continuing differentials favoring larger purchasers over smaller purchasers without cost justification for such systematic pricing practices—a situation comparable to *Morton Salt*. In *F.T.C.* v. *Sun Oil Co.*, 371 U.S. 505, the issue of substantial injury to competition was not involved. Such an injury was conceded (371 U.S. 505, 511–512, 518). *Sun Oil* is not apposite to the issue here under discussion.

In arriving at the conclusion that American's conduct had an effect on customer competition proscribed by Section 2(a) the Commission appears to have substituted the factor of the substantiality of the temporary price discrimination—the substantial price differential between the favored and the unfavored dealers—for the substantial injury to competition,

actual or reasonably probable, requisite to the establishment of the violation charged.

Pertinent here is the observation made in *F.T.C.* v. *Sun Oil Co.*, 371 U.S. 505, 527 (citing Commissioner Elman's dissenting opinion in this case) that:

> "In appraising the effects of any price cut or the corresponding response to it, both the Federal Trade Commission and the courts must make realistic appraisals of relevant competitive facts. Invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis."

In reaching the conclusion we have we do not mean to imply that a showing of intended permanency of the price discrimination is necessary to establish a Section 2(a) violation. But there must be something more than an essentially temporary minimal impact on competition and probative analysis must reveal a causal relation between the price discrimination and an actual or reasonably probable injury to competition in the context of the factual situation involved.

In view of our conclusion that the record fails to disclose the requisite substantial injury to competition we need not consider the contentions made with respect to the additional issues American raises.

The order of the Commission is set aside and the Commission is directed to dismiss the complaint.

Order set aside.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

United States Court of Appeals for the
Seventh Circuit
Chicago, Illinois, 60610

Tuesday, November 19, 1963

No. 13879

THE AMERICAN OIL COMPANY, PETITIONER

v.

FEDERAL TRADE COMMISSION, RESPONDENT

PETITION TO REVIEW AND SET ASIDE AN ORDER OF THE FEDERAL TRADE COMMISSION

Before Hon. LATHAM CASTLE, Circuit Judge; Hon. ROGER J. KILEY, Circuit Judge; Hon. LUTHER M. SWYGERT, Circuit Judge

This cause came on to be heard on the petition for review of an order of the Federal Trade Commission and the record from the Federal Trade Commission, and was argued by counsel.

On consideration whereof, it is hereby ordered by this Court that the order entered in this cause by the Federal Trade Commission on June 27, 1962, be, and the same is hereby set aside and the Commission

is directed to dismiss the complaint, in accordance with the opinion of this Court filed this day.

A true Copy:
Teste:

(Signed by) KENNETH J. CARRICK,
Clerk of the United States Court of Appeals for the Seventh Circuit.

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No. 1014

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

FEDERAL TRADE COMMISSION, *Petitioner*

v.

THE AMERICAN OIL COMPANY, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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IN THE

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No. 1014

FEDERAL TRADE COMMISSION, *Petitioner*

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THE AMERICAN OIL COMPANY, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

PRELIMINARY STATEMENT

In this case, the Federal Trade Commission seeks review of a Court of Appeals decision despite the Solicitor General's avowal that he "does not agree with the Commission" in its legal interpretations and "on the merits" (Pet. 16), and although Commissioner Elman's *dissenting opinion*, adopted by the court below, has already been cited by this Court on the key

legal issue now in controversy. See *Federal Trade Commission* v. *Sun Oil Co.*, 371 U. S. 505, 527 n. 15 (1963).[1]

Essentially, the Commission's unique petition overlooks the undisputed facts showing the absence of any competitive injury attributable to the respondent's temporary and defensive price reductions during a two-week price war in 1958. Instead the Commission seeks to test the "belief" of the Commission majority (Pet. 13), which the Solicitor General disclaims (Pet. 16),

---

[1] Notably, the instant petition also omits the customary imprimatur in antitrust cases of the Antitrust Division of the Department of Justice, which is charged with "seeking review of or defending . . . judgments rendered upon review of Federal Trade Commission orders by courts of appeal." 27 Fed. Reg., p. 12,618 (Dec. 20, 1962).

Actually, the decision below is only one of many recent Court of Appeals' reversals of defective FTC applications of the Robinson-Patman Act, often over dissents by Commissioner Elman. E. g., *Tri-Valley Packing Assn.* v. *FTC*, 1964 CCH Trade Cas., ¶ 71,052 (9th Cir. 1964); *Central Retailer-Owned Grocers, Inc.* v. *FTC*, 319 F. 2d 410 (7th Cir. 1963); *NuArc Co.* v. *FTC*, 316 F. 2d 576 (7th Cir. 1963); *Alhambra Motor Parts* v. *FTC*, 309 F. 2d 213 (9th Cir. 1962); *Thomasville Chair Co.* v. *FTC*, 306 F. 2d 541 (5th Cir. 1962); *Shulton, Inc.* v. *FTC*, 305 F. 2d 36 (7th Cir. 1962); *Exquisite Form Brassiere, Inc.* v. *FTC*, 301 F. 2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962).

When queried as to seeking Supreme Court review of *this* case, FTC Chairman Dixon acknowledged that "it is not unusual, in the past year or two, for us to find ourselves in the p[illegible]n where we disagree with the Solicitor General. Sometimes he has persuaded us to bring the point back in a stronger, factual situation than we have at the moment." Hearings Before Subcommittee No. 4 Select Committee on Small Business, House of Representatives, 88th Cong., 1st Sess., Pursuant to H. Res. 13, p. 1531 (Dec. 9, 1963). Shortly thereafter, he reiterated, with respect to *this* case, that "We would hope that in a stronger set of facts, we will take that type of situation up to the Supreme Court." FTC Dkt. 8537, Tr. of Oral Arg. p. 28 (Feb. 11, 1964).

that this Court's *Morton Salt* opinion provides a verbal formula for disposing of *all* gasoline price war cases.

But, as we shall detail: (1) Since American admittedly did not start the two-week price war in Smyrna and actively sought to confine it, the broader causes or cures of gasoline price wars cannot be adjudged on the narrow facts of this case; (2) the FTC majority's quest for a universal verbal formula to solve the legal problems posed by gasoline price wars has already been rejected by this Court's *Sun Oil* decision, which held that "mechanical word formulas cannot be made to substitute for adequate probative analysis" and "realistic appraisals of relevant competitive facts"; and (3) in any event, the unanimous decision by the Court of Appeals is clearly correct, showing that American's temporary price reductions did not cause the minimal gallonage losses by two or three American dealers during the two-week local price war.

OPINIONS BELOW

The unanimous opinion of the Court of Appeals is reported at 325 F. 2d 101, and reprinted at Pet. App. A., pp. 17-28. The majority opinion of the Commission appears at R. 628-644, and the dissenting opinion of Commissioner Elman appears at R. 644-662. For the convenience of the Court, Commissioner Elman's opinion is reprinted at Resp. App. *infra*, pp. 1a-18a.

QUESTION PRESENTED

The sole question before this Court is whether the unanimous decision by the Court of Appeals correctly concluded, on the facts of *this* record and in light of Commissioner Elman's detailed dissent, that the Com-

mission majority's ruling of "competitive injury" under the Robinson-Patman Act was unsupported by the evidence which showed that American's temporary and defensive price reductions in individual instances to a few dealers around Smyrna, Georgia were not causally responsible for the minor and transient gallonage losses by two or three other American dealers in nearby Marietta during a brief gasoline price war which American did not start.

The Court of Appeals did not reach American's statutory defenses that its price reductions were made in good faith to meet competitors' equally low prices in economic self-defense, and were made "in response to changing conditions affecting the market for" gasoline in Smyrna and vicinity.

STATEMENT

The broad implications recited by the petition cannot expand review beyond the record of this case, which concerns solely the pricing response of American Oil Company during a two-week localized price war which American did not start but made every effort to contain.

Specifically, on about October 10, 1958, a price disturbance broke out near the town of Smyrna, Ga., when a newly opened Phillips-affiliated station just north of the city limits began selling "Paraland" gasoline at 2¢ a gallon below the price then typically charged in that vicinity by major brand stations (R. 24, 259-61, 278). A nearby Shell station matched these lower Paraland prices with a 2¢ reduction, and prices spiraled downward as the Paraland station cut its prices 2¢ more, which in turn was met by the Shell station. The price cuts by these stations were then

met by nearby Sinclair and Gulf stations, and spread rapidly southward into Smyrna itself (R. 260-62).

As the price cutting broadened, American attempted to help its own dealers who complained of cut prices by nearby competitors, by giving temporary price reductions in an amount no greater than competing suppliers had previously given to their own dealers in each instance (CX 362-69, R. 541-48, CX 375-78, R. 554-57). On this basis, American first gave a 3.5¢ per gallon price reduction to its handful of dealers in Smyrna and vicinity (CX 362-63, R. 541-42).[2] After its competitors' price cuts deepened, American followed with additional reductions to its immediately affected Smyrna dealers.

In each instance, prior to reducing its price to any dealer, American verified that he was in fact suffering cut price competition from rival stations nearby, *and* that these had already been receiving price assistance from their suppliers—including Sinclair, Gulf, Shell and Texaco (CX 362-69, 375-78, R. 541-48, 554-57).

Rather than spread the price war beyond Smyrna, American did *not* simultaneously extend the same price reduction to its dealers in Marietta or on U. S. Highway 41 leading north to Chattanooga and south to Atlanta. For most of the two-week period, American's prices to its Smyrna dealers thus averaged about 5¢ per gallon lower than to its Marietta dealers (e.g. CX 378, 380, R. 557, 559). But after cut prices by competing suppliers had carried the price disturbance north into Marietta, American on October 18 and 22 reduced its prices also to its Marietta dealers. In each

[2] Technically, American's reduction took the form of increasing its CPA (competitive price allowance) from .7 to 4.2 cents (CX 160a-b, R. 361-2) and by greater amounts successively.

instance, once again, American's price reductions to its few Marietta dealers were given only in the face of cut price competition by rival stations which had previously received price assistance from their suppliers—including Sinclair, Shell, Standard of Kentucky, Texaco and Gulf (CX 370-72, R. 549-51; CX 379-80, R. 558-59; R. 253-54, 272).

By October 28 the price war ended as suddenly as it began, and prices of all competitors returned to higher levels (CX 383-84, R. 560-61).

During this brief and localized price disturbance, American's Marietta dealers experienced only minor and transitory business inroads. No American dealer in Marietta blamed his temporary gallonage loss on American's price reductions to its Smyrna dealers, as distinct from the general price cutting melee in Smyrna involving American's competitors.[3]

---

[3] Only one dealer recipient of American's lower Smyrna price, George Hicks, was ever identified as a possible beneficiary of gallonage lost by any American Marietta dealer (R. 633-35). Actually, Hicks, whose station was near the hub of the original Paraland price cutting fracas, had independently reduced his prices to meet nearby Sinclair, Phillips, and Gulf stations at least four days before he bought at a lower price from American (R. 132-34, 184, CX 329, R. 523; CX 182, R. 393).

As for the "lost business" by the three named Marietta dealers (see Pet. 5), (1) Hitt testified that no American outlet receiving a lower price was located sufficiently close to his station to affect his business "in any way" during the 1958 Smyrna price war (R. 215-16). Moreover, Hitt's business records showed he lost no volume during the price war (CX 398, R. 574-84); (2) Smith's daily records showed that his sales during the price war period were in fact higher than in the weeks before and after (CX 397 A-C, R. 571-73; RX 1A-NN, R. 588-93); and (3) Seagraves, who had just opened up a new station on U.S. 41, felt his business "slacking up each day" after the prices dropped in Smyrna, but his "business went to picking back up", after he, within a few days, also received the lower price (R. 132-34).

But their losses would have been no less if American had failed to assist its Smyrna dealers, since due to the general Smyrna price cutting "the competition would have gotten all of the business" anyway (R. 277). On the other hand, if American had simultaneously extended its temporary price reduction beyond Smyrna north into Marietta or onto Highway 41, inevitably "the price war would have spread to other areas" (R. 274).

Over Commissioner Elman's pointed dissent, the majority Commissioners nevertheless ruled that American's prices created "injury" to competition, wholly irrespective of the competitive conditions and general price cutting in Smyrna which preceded American's own price reductions (R. 634-35).

In Commissioner Elman's view,

> "The much lower prices generally prevailing in Smyrna would have diverted customers from American's Marietta dealers, regardless of the prices which respondent charged its dealers in Smyrna. Any injury to American's Marietta dealers was caused, not by the difference in the prices which American was charging its dealers in these two communities but by the fact that as long as a general price war was going on in Smyrna, and all dealers there were selling gas far below the prices in Marietta, dealers in the latter town—American dealers included—were bound to lose business" (R. 655).

Moreover, "American's price cuts to Smyrna dealers were its competitive response to dynamic market conditions which it did not create and over whose rapid changes it had no control" (R. 656). For, American "did not start the price fracas but found itself caught

helplessly in the middle of all the shooting," and "chose the course of action having the least injurious effect upon competition" (R. 656-57).

Commissioner Elman perceived only these alternatives to the course American had followed: "It could have done nothing," so that its besieged dealers "would have lost all or most of their business to other dealers selling competing brands who had already received price reductions from their suppliers"; or, American could have given its lower price to additional dealers, which "would surely have intensified the price cutting, transforming the brief skirmish into a prolonged, widespread, all-out devastating price war" (R. 657).

In essence, Commissioner Elman believed that "the Commission's approach here again illustrates the danger of dealing with the complexities of a free competitive economy simply by adopting a verbal formula which seems to provide the easiest route to an order to cease and desist . . ." (R. 659).

The Court of Appeals set the Commission majority's ruling aside. Thus, the court concluded that any gallonage losses by American's Marietta dealers were "relatively minor and temporary" and had only "minimal" impact on competition. 325 F. 2d at 105, 106. But since the general Smyrna price cutting drained off the sales of American's Marietta dealers, in any event, there was no "substantial basis upon which to attribute to American's conduct a reasonably probable substantial injury to competition," or to establish a "causal relation between the price discrimination and an actual or reasonably probable injury to competition." *Id.* at 106.

In the court's view, and as recognized by Commissioner Elman (R. 645-51), the generalized doctrine of

the *Morton Salt* case was thus not in point. There, the "inherent capability of lessening competitive ability" stemmed from the operation of a "discriminatory pricing system" which "gave buyers of large quantities a built-in, routine and permanent price advantage over smaller rivals." 325 F. 2d at 106. But such "continuing differentials" in a "discriminatory pricing system" (*ibid.*) had no resemblance to a supplier's temporary and defensive price reductions in a competitive context not of his own making and beyond his control.

Quoting this Court's *Sun Oil* opinion, which had cited the instant Elman dissent (371 U.S. at 527), the court below concluded:

> "In appraising the effects of any price-cut or the corresponding response to it, both the Federal Trade Commission and the courts must make realistic appraisals of relevant competitive facts. Invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis." 325 F. 2d at 106.

ARGUMENT IN OPPOSITION TO CERTIORARI

(1) Since American Admittedly Did Not Start the Two-Week Price War in Smyrna and Actively Sought To Confine It, The Broader Causes or Cures of Gasoline Price Wars Cannot Be Adjudged on the Narrow Facts of This Case

Although *dehors* the record of this case,[4] gasoline price wars doubtless present complex economic prob-

[4] The petition's principal "Reasons for Granting the Writ" (Pet. 7-10) are based not on *this* record, but assert sweeping generalities about "the oil industry," the "major oil companies," and the plight of "thousands of independent retail gasoline dealers," as derived from "various congressional committees and individual members of Congress" who have "urged the Commission" to find cures.

lems. But this Court's *Sun Oil* opinion has already perceived the scarcity of reliable facts and the futility of broad generalizations about price wars as an aid to adjudicating a particular case: The Court recognized that "such price warfare appears to be caused by a number of basic factors," that "it is wholly unclear whether allowance of the price discrimination prolongs or shortens the war's duration", and that "there are logical arguments on both sides of the question and none are wholly persuasive." 371 U.S. 505, 525 (1963).[5]

Above all, the Court acknowledged that "whatever we do here can neither eliminate nor mitigate the major economic forces which are productive of these price wars." *Ibid.*

Nor can the narrow compass of *this* case reveal broader solutions. As Commissioner Elman pointed out, the instant price war "was not planned or the product of a policy of systematic price discriminations," but reflected "immediate competitive responses to individual competitive situations" (R. 656). Moreover, "the Smyrna price war was not respondent's idea or invention, and respondent terminated its price cuts, for competitive reasons, as soon as the actions of its competitors permitted" (*ibid.*). In addition, "American was never the leader. Its price reductions were

[5] FTC Chairman Dixon also acknowledged that "one of the serious problems relative to this industry is the lack of reliable data which will enable one to separate fact from fiction." Hearings Before Subcommittee No. 4, Select Committee on Small Business, House of Representatives, 88th Cong., 1st Sess., Pursuant to H. Res. 13, p. 1551 (Dec. 9, 1963). And see De Chazeau and Kahn, *Integration and Competition in the Petroleum Industry* 477, 483 (1959); Dirlam & Kahn, *Leadership and Conflict in the Pricing of Gasoline*, 61 Yale L.J. 818, 843 (1952).

made only to meet those previously made by its competitors," and "were its competitive response to dynamic market conditions which it did not create and over whose rapid changes it had no control" (R. 652, 656).

Moreover, this case is hardly the vehicle for broad pronouncements on gasoline price wars. For, as Commissioner Elman recognized, any realistic evaluation of gasoline price wars, their cause or cure, could only be based on an inquiry which "has not been made in *this* case," and presents "an unresolved question of fact on which the Commission's opinion casts no light" (R. 650-51).[6]

(2) The FTC Majority's Quest for a Universal Verbal Formula To Solve the Legal Problems Posed by Gasoline Price Wars Has Already Been Rejected by This Court's Sun Oil Decision, Which Held That "Mechanical Word Formulas Cannot Be Made To Substitute for Adequate Probative Analysis" and "Realistic Appraisals of Relevant Competitive Facts"

Whatever "the Commission believes" (Pet. 12, 13, 14) (the Solicitor General disagreeing), no verbal formula based on the *Morton Salt* case, or any other precedent, can provide a panacea for complex economic problems in the competitive marketing of gasoline or any other product. As recognized by this Court long before the *Sun Oil* decision, "industrial activities cannot be confined to trim categories," and antitrust cases "must be read in light of their facts and of a

[6] Four years after the events in issue, and while the instant case was pending before the Court of Appeals, the Commission filed a complaint against Shell which is now pending before the FTC on review of a Hearing Examiner's Initial Decision. Dkt. 8537 (Oct. 1, 1963).

clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions is to be applied." *United States* v. *E. I. duPont de Nemours & Co.*, 351 U.S. 377, 395 (1956); *Maple Flooring Assn.* v. *United States*, 268 U.S. 563, 579 (1925). See also *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 527 (1963).

Sixteen years ago this Court's *Morton Salt* decision invalidated, as injurious to competition under the Robinson-Patman Act, a discriminatory quantity discount system which favored large grocery chains over small independent grocers.[7] "Quite obviously," as seen by Commissioner Elman and the court below, "the systematic and continued maintenance of such discriminatory price differentials had the inevitable result of impairing the ability of the disfavored customers to hold an effective competition position vis-a-vis their favored rivals" (R. 646-47; cf. 325 F. 2d at 106). For, "Where, as in *Morton Salt*, a systematic, established, and continuing price discrimination between competing groups of buyers is maintained, the injury to competition is manifest, and no one would seriously suggest in such a case that the Commission must show that the disfavored buyers have been driven to the wall" (R. 648).

On comparable facts, the courts of appeals in the various circuits have consistently upheld findings of competitive injury by reference to this Court's *Morton*

[7] *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948). And see *FTC* v. *Cement Institute*, 333 U.S. 683, 725 (1948) (invalidating "a sales system which consistently results in [the seller's] getting more money for like goods from some customers than he does from others").

Salt decision.[8] Only this month this Court declined to review a unanimous decision, *by the court below* which, on the authority of *Morton Salt*, had sustained the FTC's invalidation of a discriminatory discount system. *Mueller Co.* v. *FTC*, 323 F. 2d 44, 46 (7th Cir. 1963), *cert. denied*, No. 835, O.T. 1963 (May 4, 1964).

But heretofore, the courts of appeals *and* the Federal Trade Commission have perceived that *Morton Salt* contains no talisman to obviate expert evaluation of economic facts in complex pricing cases. Only weeks ago, another unanimous decision by another circuit invalidated an FTC majority ruling, Commissioner Elman dissenting, which discerned competitive "injury" from price bid arrangements for canned groceries without adequate analysis of controlling economic facts. *Tri-Valley Packing Assn.* v. *FTC*, 1964 CCH Trade Cas. ¶71,059 (9th Cir., March 18, 1964). And numerous rulings by the FTC itself have exonerated price differentials among competing customers where, in view of the particular competitive context, there was no resemblance to the discriminatory

[8] E.g., *Standard Motor Products, Inc.* v. *FTC*, 265 F. 2d 674 (2d Cir. 1959), *cert. denied*, 361 U.S. 826 (1959); *P. Sorensen Manufacturing Co.* v. *FTC*, 246 F. 2d 687 (D.C. Cir. 1957); *P. & D. Manufacturing Co.* v. *FTC*, 245 F. 2d 281 (7th Cir. 1957), *cert. denied*, 355 U.S. 884 (1957); *C.E. Nichoff & Co.* v. *FTC*, 241 F. 2d 37 (7th Cir. 1957), *modified on other grounds*, 355 U.S. 411 (1958); *Whitaker Cable Corp.* v. *FTC*, 239 F. 2d 253 (7th Cir. 1956), *cert. denied*, 353 U.S. 938 (1957); *E. Edelmann & Co.* v. *FTC*, 239 F. 2d 152 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958); *Moog Industries, Inc.* v. *FTC*, 238 F. 2d 43 (8th Cir. 1956), *aff'd on other grounds*, 355 U.S. 411 (1958).

favoritism for large buyers reprehended by the Robinson-Patman Act and invalidated by *Morton Salt*.[9]

Indeed, any "automatic verbal-formula approach in determining probable injury to competition" (R. 649) would mock the Commission's intended role as "a body of experts" to sift the competitively beneficial from the competitively inimical forms of price variation. Cf. *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 54 (1948); *FTC* v. *R. F. Keppel & Bro., Inc.*, 291 U.S. 304, 314 (1934).

The instant decision by the Court of Appeals, in sum, reflects no novel departure from *Morton Salt*. Rather, the Court of Appeals' decision responds precisely to this Court's *Sun Oil* directive that "in appraising the effects of any price cut or the correspond-

[9] E.g., *Purex Corp.*, 51 F.T.C. 100, 113-114, 176-177 (1954) (recognition that *Morton Salt* "should not be applied automatically" and that competitive injury does not necessarily flow from isolated loss of sales); *Fred Brunner Corp.*, 57 F.T.C. 771, 782 (1960) (no competitive "injury" from discriminations "viewed in the light of the actual competitive situation"); *Foremost Dairies, Inc.*, Dkt. 7475, pp. 2-4 (May 23, 1963) (partial dismissal concerning some discounts where record reflected "neither their magnitude nor their duration"); Initial Decision, *Forster Mfg. Co.*, Dkt. 7207, pp. 27-28 (Feb. 2, 1962), adopted by FTC Opinion, pp. 4, 25 (Jan. 3, 1963) (partial dismissal where one price differential of inconsequential impact on customer competition); *Frank G. Shattuck Co.*, Dkt. 7743, pp. 6-8 (Apr. 22, 1964) (dismissal where "no proof of actual competitive injury" or "probable impact on average net profits"); cf. Initial Decisions, *Pacific Molasses Co.*, Dkt. 7462, pp. 33-34 (Dec. 17, 1962), (no "significant" injury where price protection granted "only sporadically"); *American Metal Products Co.*, Dkt. 7365, p. 13 (Jan. 15, 1962), vacated as moot (June 8, 1962) (price differential to particular buyer gave it no competitive "advantage"). See also Edwards, *The Price Discrimination Law* 629 (1959); Dirlam & Kahn, *Fair Competition: The Law and Economics of Antitrust Policy* 258 (1954).

ing response to it, both the Federal Trade Commission and the courts must make realistic appraisals of relevant competitive facts."[10]

No basis exists, moreover, for any speculation that review of *this* case can somehow predetermine other FTC proceedings, whether pending or not yet brought, which are ostensibly "based on the same theory of injury to competition that is involved in the present case" (Pet. 10). In the first place, no "theory" is discernible from the FTC majority's position other than the assumption that all substantial price differentials among competing customers are automatically injurious to competition, regardless of competitive circumstances. Such a lethal "theory" would outlaw not only all price differentials during gasoline price wars but in every other marketing context, and thereby "raise the specter of a flat prohibition of price differentials" which this Court has disclaimed. *FTC* v. *Anheuser-Busch, Inc.*, 363 U.S. 536, 553 (1960).

Moreover, the three cases cited by the Commission (Pet. 10) may face dismissal on the basis of the various statutory defenses for the challenged pricing, apart from any issue as to competitive injury.[11] In

[10] 371 U.S. at 527.

[11] For example, in *Texaco, Inc.*, Dkt. 6898, the Initial Decision sustained a meeting competition defense as to some of the challenged prices, which were alternatively exonerated in view of the geographic distances separating the affected dealers. Dkt. 6898, p. 31 (Dec. 3, 1962). In the *Shell* case, some charges were dismissed by the Initial Decision for inadequate proof of interstate commerce, and other charges are subject to statutory cost justification and meeting competition defenses. Dkt. 8537, pp. 10-11, 20, 24-28 (Oct. 1, 1963). The *Humble* case also involves a cost justification defense, which was never an issue in *this* case. Opinion Accompanying Ruling on Certified Question, Dkt. 8543, p. 4 (Dec. 5, 1963).

any event, each reflects a distinct and disparate evidentiary record which hardly permits prognostication as to ultimate disposition by the Commission, let alone before a reviewing court. Even more conjectural are the unidentified "eight investigations" (Pet. 10), and *their* upshot *if* a formal complaint is filed by the Commission, *if* a hearing examiner finds the unrevealed charges proven and rejects all potential defenses, *and if* a majority of the Commission adjudges a statutory violation on the basis of the evidence of record and disapproves all possible statutory defenses in the particular case.

Still more fanciful is the prophesy that the Seventh Circuit "would undoubtedly set aside any orders" issued by the FTC "on the same theory of injury to competition that is involved in the present case" (Pet. 10). Aside from this questionable prejudgment as to the Commission's and the court's impartial decision in cases which have not even been filed, let alone proven, the Court of Appeals decided this case not on a "theory" but on the Commission's failure of proof, as highlighted by Commissioner Elman's dissenting opinion. Where the Commission's charges are factually supported, the court below has sustained Commission findings of injury to competition. E.g., *Mueller Co.* v. *FTC*, 323 F. 2d 44 (7th Cir. 1963), *cert. denied*, No. 835, O.T. 1963 (May 4, 1964); *E. Edelmann & Co.* v. *FTC*, 239 F. 2d 152 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958); *C. E. Nichoff & Co.* v. *FTC*, 241 F. 2d 37 (7th Cir. 1957), *modified on other grounds*, 355 U.S. 411 (1958); *Whitaker Cable Corp.* v. *FTC*, 239 F. 2d 253 (7th Cir. 1956), *cert. denied*, 353 U.S. 938 (1957); cf. *Goodyear Tire & Rubber Co.* v. *FTC*, 1964 CCH Trade Cas. ¶71,093 (7th Cir., April 24, 1964).

And in the absence of adequate proof of the requisite competitive injury, *no* court of appeals should be expected to ratify unsupportable FTC majority rulings.

(3) In Any Event, the Unanimous Decision by the Court of Appeals Is Clearly Correct, Showing That American's Temporary Price Reductions Did Not Cause the Minimal Gallonage Losses by Two or Three American Dealers During the Two-Week Local Price War

Particularly in light of this Court's admonitions in the *Sun Oil* case, the decision below is clearly correct on the basis of *the evidence in this record*.

As summarized in the Statement, *supra* pp. 4-9, whatever transitory losses beset American's Marietta dealers are traceable to the overall Smyrna price cutting initiated by American's competitors, *not* to American's belated and defensive price assistance which only met the pre-existing abnormal price condition.

By contrast, American's alternatives under the FTC majority's legal theory are competitive chaos and devastation. On the one hand, American could have done nothing, closed its eyes to the Smyrna price outbreak, and abandoned its dealers there to certain liquidation at the hands of nearby competitors aided by lower prices of their suppliers. "Competitively," as Commissioner Elman noted, "the injury to [American's] dealers would have been far more drastic" (R 657). Conversely, American could have simultaneously extended its lower prices to all American dealers in Marietta and on U.S. 41, prior to such action by competitors. Inevitably, such a blanket price cut would have spread the local Smyrna price war to other regions, and spilled the price cutting onto the super-

highway south to Atlanta and Florida and north to Chattanooga and beyond—exploding "a local brush fire into a nuclear price war" (R. 658).

Beyond the competitive havoc threatened by the FTC majority's alternatives, the FTC's position would trap any supplier in a hopeless legal dilemma. To Commissioner Elman's pointed inquiry as to where American's price reductions *could* safely stop, FTC counsel baldly retorted: "I don't think I am capable of answering that, and I don't think you are, and I don't think anybody is capable of answering that question" (R. 625).

The Court of Appeals inevitably recognized that the FTC majority had shunned the essential "realistic appraisals" prescribed by this Court's *Sun Oil* opinion, instead "adopting a verbal formula which seems to provide the easiest route to an order to cease and desist" (R. 659; cf. 325 F. 2d at 106).

CONCLUSION

The decision of the court below is clearly correct, and nowhere does the Solicitor General's position maintain the contrary. The overall problem of gasoline price wars, as recognized by this Court's *Sun Oil* opinion, is incapable of solution on this narrow factual record. To be sure, "the Commission believes," although the Solicitor General "does not agree," that the *Morton Salt* decision provides a verbal formula for the resolution of all future controversies relating to gasoline pricing. But the decision below is based on the facts of *this* case and not on any formula, and this Court's *Sun Oil* opinion has already repudiated "mechanical word formulas" as a "substitute for ade-

quate probative analysis"; and "realistic appraisals of relevant competitive facts." 371 U.S. at 527.

For the foregoing reasons, the petition for certiorari should be denied.

On the other hand, if a dispositive ruling by this Court appears appropriate, the Court may well enter a summary affirmance of the decision below, in the absence of any substantial legal or factual issue presented for review, and on the basis of the representations of the Solicitor General and the opinion of Commissioner Elman. Cf. *United Shoe Machinery Corp. v. United States*, 347 U.S. 521 (1954).

Respectfully submitted,

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May 20, 1964

APPENDIX

Dissenting Opinion of Commissioner Elman

UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION

Commissioners:

Paul Rand Dixon, Chairman
Sigurd Anderson
William C. Kern
Philip Elman
Everette MacIntyre

Docket No. 8183

In the Matter of

AMERICAN OIL COMPANY, a corporation.

Commissioner Elman, dissenting.

I.

The Commission's disposition of this case calls to mind the observation of Mr. Justice Holmes that "To rest upon a formula is a slumber that, prolonged, means death." (*Collected Legal Papers*, p. 306) In the same vein he had warned, when he sat on the Supreme Judicial Court of Massachusetts, of the danger "of being misled by ready-made generalizations, and of thinking only in phrases to which, as lawyers, the judges have become accustomed, instead of looking straight at things, and regarding the facts in all their concreteness, as a jury would do. Too broadly generalized conceptions are a constant source of fallacy." *Lorenzo* v. *Wirth*, 170 Mass. 596, 600.

It seems to me, with all deference to my colleagues, that they are deciding this case by resting upon, and applying uncritically, "formulas" and "too broadly generalized

conceptions" derived from significantly different factual contexts. I shall not attempt to catalogue all the difficulties and doubts that, in my mind at least, are engendered by the majority opinion. My disagreement here is with the basic presuppositions underlying the Commission's decision.

In a Section 2(a) Robinson-Patman Act case, two elements of proof are crucial to a finding of violation: price discrimination, and probable injury to competition. The former is clearly present here; as all agree. Respondent does not deny that the differences in price to its customers constituted "discriminations". It contends rather that the price differentials were not shown to have caused the requisite injury to competition, and were in any event justified by its competitive need to meet the lower prices of rival sellers.

The Commission finds no difficulty in disposing of the question of probable injury to competition. The law on this point, it declares, has been authoritatively settled by the Supreme Court's decision in *Federal Trade Commission* v. *Morton Salt Co.*, 334 U.S. 37 (1948). There, the Commission's opinion states (p. 3), the Supreme Court held "that in price discrimination cases involving competition between buyers, the requisite injury to such competition may be inferred from a showing that the seller charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors and that the amount of this discrimination was substantial". The Commission's opinion continues: "Complete reliance upon this doctrine, however, is not crucial here. The record in this case contains evidence of a positive character fully justifying a finding of probable injury to competition." The "positive" evidence cited by the Commission, however, simply shows that "competition did exist between the favored and nonfavored customers * * * and that the price difference between the two classes of

customers was sufficient to give the former a significant competitive advantage." (Opinion, pp. 3-4)

In other words, the legal formula which the Commission derives from *Morton Salt* is that "competition between buyers" *plus* "substantial difference in price" *equals* "significant competitive advantage" to the favored buyers, which in turn *equals* "probable injury to competition".

The attractiveness of this formula cannot be denied. Its application dispenses with the need for inquiry into the probable effects on competition, either generally or with disfavored customers, of a price discrimination, so long as the difference in price is substantial in amount. But the Supreme Court surely did not intend in *Morton Salt* to relieve the Commission of the duty to make an informed expert judgment, based upon the relevant economic facts, as to the likelihood of injury to competition resulting from differing kinds of price discrimination. The Court did not lay down a hornbook black-letter formula, to be applied automatically and indiscriminately to every type of price discrimination without regard to differences in economic effect.

Morton Salt was a classic "secondary line" case, where the seller established and regularly maintained a discriminatory "two-price system" under which his favored, usually larger, customers paid substantially less for the same products than other customers with whom they were in competition. Quite obviously, as the Supreme Court held, the systematic and continued maintenance of such discriminatory price differentials had the inevitable result of impairing the ability of the disfavored customers to hold an effective competitive position vis-a-vis their favored rivals. 334 U.S. at 47-50; *cf., Standard Motor Products, Inc.* v. *Federal Trade Commission*, 265 F. 2d 674 (C.A. 2), cert. denied, 361 U.S. 826. In *Morton Salt*, the probable injury to competition was clearly and easily identifiable as an inevitable aspect of the discriminatory two-price system.

But, in so holding, the Supreme Court was expressing a conclusion based on the particular facts, not a universal rule of law.[1]

A finding of probable injury to competition does not require evidence that the disfavored buyers have gone out of business or are on the verge of bankruptcy. By the same token, evidence that such buyers have suffered a temporary loss of sales does not, without more, establish that their capacity to compete vigorously and effectively in the market has probably been injured. Whether probable

[1] "The scope given to the new concept of injury in the *Morton Salt* case was explicitly justified by the Supreme Court on the ground that without it *cumulative* effects would go unchecked. A question necessarily arises as to whether or not the scope of the concept of injury to a class of competitors should vary from one context to another with changes in the probability that there will be such cumulative effects." Edwards, *The Price Discrimination Law* (1959), p. 538 (emphasis added).

As Edwards also points out:

> "It is unreasonable to use the law of price discrimination to attack minute inequalities among buyers. Where such inequalities are ephemeral or have no central pattern, they may well be offset at other times or on other commodities. Any one buyer may sometimes be favored and sometimes disfavored. Moreover, since the defense of cost justification is not readily available, insistence on equal treatment in all particulars except where cost differences can be shown tends to make price structures unduly inflexible." (at p. 639)
>
> "There is little reason to try to assure by law an equality of prices so pervasive that it prevails generally in the relation among small and numerous buyers. Though price discrimination may create disparities of opportunity among such concerns, the likelihood of offsetting disparities on other goods or at other times is so great that little would be gained from an effort to curb such inequalities. Substantial, consistent, cumulative inequality is to be expected only where favored buyers are relatively large and strong. Only in such circumstances are we justified in considering an intervention that subjects the detail of price relationship to pervasive control." (at p. 641)

injury to competition will result from a price discrimination entails, at the least, an inquiry into the nature, size, scope, and duration of the differential. Where, as in *Morton Salt*, a systematic, established, and continuing price discrimination between competing groups of buyers is maintained, the injury to competition is manifest, and no one would seriously suggest in such a case that the Commission must show that the disfavored buyers have been driven to the wall. But where the price discrimination is not comparable to that involved in *Morton Salt*, the effects on competition should be found "in the light of the actual competitive situation surrounding the particular pricing practice charged to be illegal." *Fred Brouner Corp.*, Docket 7068 (September 29, 1960).[2]

At this point, perhaps, it might be helpful to refer to another leading Robinson-Patman Act case, *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U.S. 536 (1960). That case is relevant here not because of any similarities in the factual situations involved, but because it makes clear the inappropriateness of adopting an automatic, verbal-formula approach in determining probable injury to competition. In *Anheuser-Busch* the Court held that under the Act a price "discrimination" is merely a difference in price. But, as the Supreme Court was careful to point out, its decision in that case "does not raise the specter of a flat prohibition of price differentials inasmuch as price differences constitute but one element of a Section 2(a) violation. In fact, as we have indicated, respondent has vigorously contested this very case on the *entirely separate grounds of insufficient injury to competition* and good faith lowering of price to meet competition." (*Id.*, p. 553; emphasis added)

[2] The same requirement is reflected in the Commission's 1948 Policy Statement, issued immediately after the Supreme Court's decision in *Morton Salt*. Relevant portions of this Statement are quoted in *General Foods Corp.*, 50 F.T.C. 885, 887-888 (1954).

Anheuser-Busch exemplifies what are described in anti-trust jargon as "territorial" price discriminations. As the legislative history of the Clayton Act of 1914 shows, one of the primary evils at which it was directed was injury to seller competition resulting from geographical or area price discrimination, typified by destructive local raids against small competitors by large multi-state sellers. As was stated in the House Judiciary Committee Report (H. Rep. 627, 63rd Cong., 2d Sess., p. 8):

> "It [Section 2] is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations * * * have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling their goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country."

In the instant case, it must be emphasized, neither the complaint alleges nor the proof shows that respondent, a major producer of gasoline, acting individually or in concert with other majors, engaged in selective price warfare directed against individual outlets of smaller, independent producers. Independents, as is well known, do not ordinarily have the resources to compete successfully with the majors in such price warfare; and where undertaken by major producers, its purpose and effect may well be either to drive the independents out of business or to coerce them into avoiding price competition, with the inevitable long-range result of rigidifying the price structure in the industry, and thus injuring competition in a most vital way.

But that is not this case. The facts here present a special and unique kind of price discrimination, with effects on competition that cannot automatically be assimilated to the familiar, systematic, continuing price discriminations which the Commission is accustomed to deal with and to which it customarily applies the *Morton Salt*

formula. What this case involves is a short-lived flurry of competitive price cutting by all sellers of gasoline in a local area. This phenomenon, usually described with dramatic hyperbole as a "price war", has long been familiar in the gasoline industry. But, although price wars have large importance to the gasoline industry and have been the subject of extensive study, no apparent consensus exists as to whether this phenomenon signifies the vigor of competition in this industry or the lack of it.

Ordinarily, of course, consistent uniformity of price between competitors is not regarded as proof of the existence of healthy, free competition in the industry. Nor, by the same token, would it generally be said that fluctuations in price and active underselling of competitors reflect unhealthy and restrictive competitive conditions. Whether particular price activity manifests the "competition that kills" or the competition that enables a free economy to grow and expand can only be determined upon inquiry into the relevant economic facts. Such inquiry has not been made in this case. The Commission's conclusion that the gasoline price "war" here was injurious to competition reflects only an unverified assumption based on a legal formula derived from *Morton Salt*. Thus, whether the periodic or occasional outbreak of gasoline price-cutting in a local area serves to increase or decrease competition at the producer, distributor and retailer levels of distribution remains an unresolved question of fact on which the Commission's opinion casts no light.

To repeat: my main difficulty with the majority opinion springs from its failure to recognize and to bring to bear an expert evaluation of the special and distinctive effects on competition of a local, limited gasoline price war. The Commission, it seems to me, has transformed a hard case into an easy one by applying an old well-worn formula taken from a different economic context and which, though appropriate for the situation in which it was developed, is out of place as applied to the facts of this situation—to which I now turn.

II.

Respondent, a major gasoline producer, was caught squarely in the middle of a brief but intense price "war" that flared up in and around Smyrna and Marietta, Georgia, for about two weeks in October of 1958. The complaint charged that, in the course of this two-week skirmish, respondent lowered prices to its dealers in Smyrna by greater amounts than to its competing dealers in Marietta. It was alleged that the result of respondent's actions "may be substantially to lessen competition or to destroy or prevent competition with those retailers of respondent's gasolines who received the lower prices." (This is the boiler-plate allegation of injury to competition at the "secondary" line of commerce.)

Smyrna is located approximately five miles northwest of Atlanta on State Route 3. Marietta is approximately four miles further north at the point where Route 3 and U.S. Route 41—which parallel each other from Atlanta—converge. Route 41 is a major north-south artery extending from Chicago to Miami. American sells gasoline in most of the states along this route—namely, Kentucky, Tennessee, Georgia, and Florida.

The price melee here began about October 10, 1958, when a Shell station lowered its price to meet the price of a newly-opened Paraland station. Shell is, of course, a major producer. Although "Paraland" is not regarded in the industry as a major brand, respondent's district sales manager testified that the company was owned by or affiliated with Phillips, another major producer. From this humble beginning the price-cutting rapidly spread throughout the Smyrna area. As in the case of most so-called "wars" in the gasoline industry, the dealers were not left to fight it out by themselves, but received the ammunition of "competitive price allowances" (or CPA's) from their suppliers. These lowered prices, in the form of CPA's, were apparently a matter of general knowledge in the trade. Unless he received these CPA's from his

supplier, a particular dealer would not be able to survive very long. If he had to pay more for gas than the price at which a station across the street was selling a competing brand, a dealer would not be likely to stay in business.

In the series of price reductions which ensued as the Smyrna "war" increased in intensity, American was never the leader. Its price reductions were made only to meet those previously made by its competitors. Thus, on the 11th of October, American increased its dealers' discount in Smyrna to 4.2 cents per gallon, meeting a price reduction by Sinclair on the previous day. On the 14th its discounts were increased to 6.7 cents, to meet Gulf and Shell; on the 15th to 8.7 cents, to meet Gulf and Sinclair; on the 17th to 10.7 cents, to meet Shell, Texas, and Sinclair; on the 20th to 11.7 cents, to meet Gulf, Shell, and Sinclair; and, finally, on the 21st to 14.7 cents, to meet Texas, Shell, and Sinclair. No further price reductions were made after October 21st, and by the 28th higher prices were restored and the two-week war, in which more gas than blood was spilled, was over.[3]

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[3] The following account of the war was given by American's district sales manager:

> Q. Mr. Myers, would you tell us your understanding concerning the circumstances relating to the start of the price war in Smyrna in October, 1958?
>
> A. Well, I understand it was Paraland who operates or posts prices as an independent. They had a station on South Cobb Drive, and when they had that station under construction Shell or someone indicated that they would post the same price as Paraland should they open up as an independent, and when Paraland did open up as an independent, Shell did meet them. Shell had a station one block north of the Paraland location. Shell did meet them, and Paraland dropped their price again. I believe it was another 2 cents a gallon, and Shell met that when they did.
>
> Then I think the next company was Sinclair, and I think Gulf and several others dropped to meet that competition. Then all companies dropped to meet it to meet the other major competition. And then they kept this price decreasing until it got to the ridiculous extent that it got to. (Tr. p. 576)

The impact of these events in Smyrna on prices in Marietta, five miles away, was neither immediate nor severe. Again only following the lead of its competitors, American had by October 22 increased the CPA's granted its Marietta dealers to 9.7 cents, but there still remained a differential of 5 cents per gallon between the prices to its dealers in the two communities.

Since Smyrna and Marietta are geographically adjacent, gasoline dealers in one community compete with those in the other. The price war here gave the Smyrna dealers a brief, temporary advantage in this competition, in that their lower prices attracted business away from gas stations in Marietta. American dealers in Marietta were among those who lost sales and, according to the evidence, customers who usually purchased American's products in Marietta switched to stations in Smyrna. But, so far as appears, the business of the Marietta dealers returned to normal at the end of the two-week war, and this temporary diversion of sales had no effect on their ability to remain in effective competition with other dealers.

III.

Although the marketing effects of a concentrated, confined outburst of price-cutting such as occurred here are far from clear, the Commission, relying upon the *Morton Salt* case, infers probable injury to competition from the fact that American charged substantially different prices to competing customers. But, as already pointed out, that case involved a regular, established, continuing multiple-price system, which inevitably impaired the capacity of the disfavored customers to remain effective competitors in the market. American's price discriminations, however, were immediate and transient responses to a temporary competitive situation over which it had no control. This does not mean that what American did was necessarily legal. It does mean, however, that the necessary competitive injury cannot be inferred simply on the authority of *Morton Salt*.

In the first place, it appears to have been the price war generally—a situation which American did not create—which was responsible for any competitive injury to its Marietta dealers. Section 2(a) requires that probable competitive injury derive from the discrimination or difference in price charged to different buyers. But American reduced prices to its Smyrna dealers only after equally large price reductions had been made by competing producers and by their dealers. The much lower prices generally prevailing in Smyrna would have diverted customers from American's Marietta dealers, regardless of the prices which respondent charged its dealers in Smyrna. Any injury to American's Marietta dealers was caused not by the difference in the prices which American was charging its dealers in these two communities but by the fact that as long as a general price war was going on in Smyrna, and all dealers there were selling gas far below the prices in Marietta, dealers in the latter town—American dealers included—were bound to lose business. No matter what American did, the lower prices brought about by the war in Smyrna would have caused many customers in Marietta to drive to Smyrna to buy gasoline.

Second, the Smyrna price "war" was but a skirmish, lasting barely two weeks. True enough, in that period many of the Marietta dealers' customers bought gas in Smyrna. But the Act does not insulate businessmen from transient losses of sales, but only against the likelihood of "injury to competition". At the end of the war the business of the Marietta dealers returned to normal, and there is neither allegation nor proof of any permanent diversion of customers. In fact, the record shows that at least one of them enjoyed substantially greater sales in October 1958 than he did in the same month of either the preceding or following year. This is certainly a far cry from the injury to competition found in *Morton Salt*.

I see no justification for the Commission's statement that the burden of proof is on respondent to show that "these

practices were discontinued and that there is no reasonable likelihood that they will be resumed in Smyrna, Marietta or elsewhere." The burden is upon the Commission to establish the required competitive injury. A finding that such injury would result from a continuation of the allegedly illegal discriminations must be predicated on the facts showing the likelihood of such continuation, not speculations or inferences drawn from the absence of facts in the record. And where, as in this case, the only competitive injury alleged is to particular disfavored customers, the evidence must relate to them and not to other dealers "elsewhere".[6] This is not an "abandonment" problem. The fact that the Commission is "convinced . . . that respondent will continue to violate Section 2(a) unless ordered to cease and desist" would be relevant if illegality had been proved. It is irrelevant in determining whether the facts in the record prove the requisite competitive injury alleged in the complaint.

Finally, and perhaps most important, the competitive effects of American's price discriminations cannot be viewed apart from the effects of the price war as a whole. American's price cuts to Smyrna dealers were its competitive response to dynamic market conditions which it did not create and over whose rapid changes it had no control. In a price war someone is found to be hurt, and if American chose the course of action having the least injurious effects on competition, it should not be condemned as a

[6] The recurrence of a price war which would cause American again to disfavor its Marietta dealers seems highly unlikely. As this record clearly shows, gas wars of this type are not planned or the product of a policy of systematic price discriminations, but are the immediate competitive responses to individual competitive situations. The Smyrna price war was not respondent's idea or invention, and respondent terminated its price cuts, for competitive reasons, as soon as the actions of its competitors permitted. The record shows no recurrence of price warfare affecting dealers in either Smyrna and Marietta between October 1958 and the filing of this complaint in November 1960.

law-violator merely because sales were temporarily diverted from some of its dealers.

IV.

In the situation shown by the record in this case, American—which, I repeat, did not start the price fracas but found itself caught helplessly in the middle of all the shooting—had three alternatives open to it.

First, it could have done nothing, maintaining its regular prices to all of its dealers in Smyrna and Marietta. The result would have been that these dealers would have lost all or most of their business to other dealers selling competing brands who had already received price reductions from their suppliers. Competitively, the injury to respondent's dealers would have been far more drastic.

Secondly, American could have done what it in fact did, with the results shown by this record.

Thirdly, American could have done what the Commission apparently thinks it was required to do by Section 2(a)—either reduce its prices equally to all of its dealers, or "feather" them out in some way, perhaps diminishing in concentric circles from the starting point of the war, on the theory that the differentials between stations would then not have been sufficiently large to cause any diversion of business between competing stations. But either of these courses of action would surely have intensified the price-cutting, transforming the brief skirmish into a prolonged, widespread, all-out devastating price war. This dilemma is described in the testimony of American's Atlanta branch manager. In response to Commission counsel's question as to whether American's 9-cent differential to dealers two miles apart was a sufficient ground for him to recommend an increase in the unfavored dealer's CPA, he replied:

> "Quite frankly, at that time I was in a dilemma as to what to do. If you put it in you could spread it; if you kept it out you might be hurting your dealers.

That was the way I presented it to my Division Manager, and we didn't know what to do" (Tr. p. 570).[5]

If American had chosen to give equally large discounts to its Marietta dealers, where could it have safely stopped? Smyrna and Marietta are located along a major north-south highway with gasoline stations in every town along the way. A price cut to any station or group of stations would be bound to affect the sales of nearby stations up or down the road, and if American made its reductions to all stations on this highway there would undoubtedly be effects upon stations located on adjacent and intersecting roads. Under the Commission's theory American's only safe alternative would be to reduce its prices to all of its dealers everywhere. But is the Commission prepared to say that this enlargement of a local brush fire into a nuclear price war would have effects upon competition less injurious than those of the course of action which American actually pursued?

Determination of the questions posed by this case, it seems to me, involves much broader considerations than those on which the majority here base decision. For example, the effects upon the independents who seem to provide much of the competition which exists in this industry must be taken into account.[6] I do not believe that these

[5] The possibility of "feathering" would not have resolved respondent's dilemma. In the first place, it ran the risk that any differences in price between competing customers would be regarded by the Commission as "substantial" and hence *prima facie* illegal. Second, if a two-cent reduction was sufficient to start the war, any price cut by American large enough to help its dealers in areas which the war had not yet reached would simply have served to set off the spiral of reductions anew.

[6] It seems to me that the possible injury to independent dealers, distributors and producers which might result from the spread of the war would have a far more serious effect upon the vigor of competition in the industry as a whole than would the temporary diversion of sales from a few dealers in Marietta. Commenting

knotty questions can properly be avoided by focusing narrowly on "secondary line" injury and adopting a mechanical test designed for the entirely different factual situation involved in *Morton Salt*. The Commission's approach here again illustrates the danger of dealing with the complexities of a free competitive economy simply by adopting a verbal formula which seems to provide the easiest route to an order to cease and desist (see my dissent in *National Retailer-Owned Grocers, Inc., et al.*, Docket 7121, May 14, 1962).

V.

The majority opinion also raises substantial questions concerning application of the meeting competition in good faith defense. For example, in its discussion of the lawfulness of the lower competitive prices met by American, the Commission seems again to have overlooked that the controlling inquiry is the seller's subjective good faith. A seller's burden of establishing good faith is satisfied by showing that he had no reason to believe the lower price met was unlawful. He should not be required, as the Commission states (opinion, p. 10), to go further and show positive facts, known to him when he met the competitive lower price, "which would lead a reasonable and prudent person to believe that the price he was meeting was lawful." See my dissent in *Tri-Valley Packing Association*, Dockets 7225 and 7496, May 10, 1962.

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upon the current prevalence of price wars in the gasoline industry, a recent article in the New York Times (May 20, 1962) stated:

> "In the present disturbed markets, the distributor and also the dealer of the major companies generally are getting at or near their normal margin of profit and they are not being particularly hurt in the present price struggle. But the independent dealer and the distributor who does not have a major company to back him are being hurt badly in the price wars. The independent refiner, who supplies their products, also is finding it difficult to make ends meet."

While the difference between these evidentiary burdens may seem slight, the evidence on which the Commission relies to show that respondent was not acting in good faith illustrates how important the difference actually is.

The Commission finds (opinion, pp. 7-10) that the price war in the Smyrna area began when a Shell service station met the price of a competing Paraland station; that Paraland is a "private brand" of gasoline which is "traditionally sold at a lower price than the major brands"; that "the Shell station which reduced its price to the level of Paraland had not been injured in any manner whatsoever by the lower price of the private brand station"; that, therefore, the Shell station was "beating", and not meeting, competition when it reduced its price to the same level as that of its newly-opened Paraland competitor; that Shell's price reduction, being discriminatory and not made in good faith to meet the lower price of a competitor, was therefore illegal; that when respondent and the other major oil companies in turn reduced *their* prices to meet the competition of Shell's lower price, they were meeting a price which was illegal; and that, accordingly, respondent "knew or should have known that it was meeting discriminatory prices which could not have been justified under any of the exceptions to the prohibitions of the statute."

Let us assume—although I have the most serious doubts about it—that the record supports all of these findings made by the Commission. The Smyrna price war occurred in October 1958. If the Commission had received a telegram from respondent at that time, could and would it have been able to render an advisory opinion that the price reductions made by respondent's competitors were illegal? Now, almost four years later and only after an extensive hearing, the Commission finds that the lower prices of respondent's competitors—who are not parties to this proceeding—were illegal and that respondent's "good faith"

defense must therefore be rejected. If they were parties to this proceeding, respondent's competitors might be able to justify the legality of their price reductions. At all events, their "conviction" here, in a case where they are not parties and where no complaint was made against them, is the basis of "convicting" respondent of violating the law in not acting in "good faith".

This seems to me to place an unrealistic and competitively unfair burden on businessmen. "Good faith" does not require businessmen to be put in the impossible dilemma of either (1) losing business by not meeting competitors' lower prices, or (2) meeting the competitive lower prices and running the risk that years later the Commission will find these "third-party" prices to be unlawful, after complex and protracted proceedings whose outcome could not confidently be predicted even by legal experts specializing in the field of trade regulation. In this case, for example, how was respondent in October 1958 to know that "Paraland", owned by a "major" producer (Phillips), would be regarded by the Commission in June 1962 as a "private" brand entitled, apparently as a matter of law, to a "normal" differential of 2 cents a gallon lower than "major" brands? Why should respondent have "known" in October 1958 that the Commission would in June 1962 find that all of the competitive lower prices which it met were discriminatory, injured competition, were not cost-justified, were not made "in response to changing conditions affecting the market", were not made in good faith to meet competition, etc. As I said in my *Tri-Valley* dissent, "The law should not be construed as forcing a seller to compete at his peril." I fail to see what the requirement of this kind of long-range prophesying in the dark by a seller in a competitive market has to do with his subjective good faith.

Finally, as in the *Tri-Valley* case, if the illegality of the prices met by respondent was so apparent, why is it that

the Commission did not simultaneously bring price discrimination charges against all of its competitors who were equally involved in the Smyrna price war? The Commission obviously knew of these "unlawful" price reductions by respondent's competitors before this complaint was issued. It seems to me inequitable and not in the public interest to have proceeded against respondent alone. The order here operates as a broad, floating, punitive restraint on respondent's pricing activities in every market in the United States in which it engages in business in competition with other sellers. But respondent alone is now being subjected to such order, drastically limiting its ability to compete effectively. It seems fair to ask: Has the Commission's action here really promoted the "competition" which the Robinson-Patman Act was intended to protect and encourage?

June 27, 1962